91-683

(1)

No. _____

In The

Supreme Court of the United States

October Term, 1991

THE CITY OF JAMESTOWN being represented by its Mayor, STONEY C. DUNCAN, and its Aldermen, BOB BOW, HAROLD WHITED, CORDIS TAUBERT, MARK CHOATE and CAIN CHOATE,

Petitioner,

versus

JAMES CABLE PARTNERS, L.P., a Delaware Limited Partnership d/b/a BIG SOUTH FORK CABLEVISION,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Tennessee

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

QUESTION PRESENTED

1. Whether the Cable Communications Policy Act of 1984 allows exclusive cable television franchises to continue in existence after the date of the Act's passage, even in communities where the cable television market is not a "natural monopoly," thus perpetuating, as a matter of federal statutory law, a local governmental regulatory scheme that infringes the First Amendment rights of other speakers wishing to enter such market, and contrary to the expressly stated legislative purposes of the Cable Act to promote competition in cable communications, minimize unnecessary regulation, establish franchise procedures encouraging the growth and development of cable systems so as to assure their responsiveness to the needs and interests of local communities, and assure that cable communications provide, and are encouraged to provide, the widest possible diversity of information sources and services to the public.

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Petition For Writ Of Certiorari To The Supreme Court Of Tennessee

PETITION FOR WRIT OF CERTIORARI

The City of Jamestown ("Jamestown," or "the City") respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the Tennessee Court of Appeals, which opinion was effectively adopted by the Supreme Court of Tennessee in its per curiam denial of Petitioners' Application for Permission to Appeal.

OPINIONS BELOW

None of the opinions below have been officially reported. All opinions below are reproduced in full in the Appendix to this Petition, and include an Order of the Supreme Court of Tennessee, an Opinion of the Court of Appeals of Tennessee, Western Section, and an Order of the Chancery Court for Fentress County, Tennessee.

JURISDICTIONAL STATEMENT

The opinion of the Court of Appeals of Tennessee, Western Section, was rendered March 22, 1991, and the Supreme Court of Tennessee, per curiam, denied the City of Jamestown's application for permission to appeal that opinion on June 24, 1991. The City applied, on August 29, 1991, for an extension of time to file this petition until and including October 22, 1991, which application was granted. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Cable Communications Policy Act of 1984 provides in relevant part:

> The purposes of this title are to:
>
> (1) establish a national policy concerning cable communications;
>
> (2) establish franchise procedures and standards which encourage the growth and

development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community;

(3) establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems;

(4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public;

(5) establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards established by this title; and

(6) promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.

47 U.S.C. § 521.

(c) Preemption

Except as provided in section 557 of this title, any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this chapter shall be deemed to be preempted and superseded.

47 U.S.C. § 556(c).

(a) The provisions of:

(1) any franchise in effect on the effective date of this subchapter, including any such provisions which relate to the designation, use, or support for the use of channel capacity for public, educational, or governmental use, and

(2) any law of any State (as defined in section 153(v) of this title) in effect on October 30, 1984, or any regulation promulgated pursuant to such law, which relates to such designation, use or support of such channel capacity,

shall remain in effect, subject to the express provisions of this subchapter, and for not longer than the then current remaining term of the franchise as such franchise existed on such effective date.

(b) For purposes of subsection (a) of this section and other provisions of this subchapter, a franchise shall be considered in effect on the effective date of this subchapter if such franchise was granted on or before such effective date.

47 U.S.C. § 557.

(a) Authority to award franchises; public rights-of-way and easements; equal access to service

(1) A franchising authority may award, in accordance with the provisions of this subchapter, 1 or more franchises within its jurisdiction.

47 U.S.C. § 541(a).

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

This case also involves a Tennessee state law that authorizes the City's disputed cable television system's franchise, Private Chapter No. 138, Private Acts of 1990. Pursuant to Supreme Court Rule 14(f), the text of this legislative act is set forth in the Appendix to this Petition.

STATEMENT OF THE CASE

On March 14, 1977 the City of Jamestown adopted an ordinance granting a 25-year exclusive franchise to use the streets and rights-of-way of the City for a cable television system. (App. at 3). The franchise was ultimately assigned to James Cable Partners, L.P. ("James Cable"). (*Id.*)

In 1984, Congress passed the Cable Communications Policy Act, codified at 47 U.S.C. § 521, *et seq.* Under the Cable Act and the regulations promulgated by the Federal Communications Commission pursuant thereto, the City's right to regulate James Cable's rates was prohibited. (App. at 18, 4 n.2, *citing*, 47 C.F.R. § 76.5). Pursuant to 47 C.F.R. § 76.5, the Federal Communications Commission has determined that James Cable's system is subject to "effective competition" (from three off-air broadcasters viewable in Jamestown).

Under the original terms of the franchise, the City would regulate James Cable's rates. (App. at 3). However,

after the Cable Act's passage, James Cable and its predecessors sharply raised the rates charged to the residents of the City. In response to demands of City residents, impacted by these rate increases, the City granted itself a cable television franchise on January 8, 1990, and constructed its own cable television system (App. at 3), in order that City residents would have an alternative to James Cable's unregulated rates. After the City's grant of a franchise to itself, but prior to constructing its own cable television system, the Tennessee state legislature passed a private act specifically giving the City the power to own and operate a cable television system. (App. at 20-21).

James Cable then filed a declaratory judgment action in the state chancery court for Fentress County, Tennessee, seeking a declaration of the rights, status, and relation of James Cable and the City in regard to James Cable's cable television franchise. (App. at 3). The City, in its Answer to James Cable's suit, contended that the cable television operator's franchise was no longer exclusive, because its exclusivity provision had been preempted by the passage of the Cable Act. (*Id.*, App. at 18). Additionally, the City contended that the Cable Act's prohibition of the City's preexisting right to regulate the rates charged by James Cable and its predecessors effectively rescinded its franchise contract with James Cable. (*Id.*)

The Chancery Court held that the Cable Act did not amend the cable television franchise that the City had granted to James Cable's predecessors, "because 47 U.S.C. § 557 grandfathers in franchises [existing] on the date of the Act subject to certain limitations. . . . " (App. at 19, bracketed matter supplied). However, the Chancery

Court also found that the effect of the Cable Act "was to preempt the right of the City . . . to regulate rates," and that such right "was the whole consideration for the exclusive provision of the franchise. . . . " (*Id.*) Thus, the Chancery Court held that "the preemption of the right to regulate rates rescinded the exclusive provision of the franchise," and dismissed James Cable's suit. (*Id.*)

James Cable appealed to the Court of Appeals of Tennessee, Western Section, which reversed the trial court and dismissed the cause. (App. at 17). The appellate court held that the trial court improperly had rescinded the franchise contract, the appellate court finding that the contract was not severable, nor was the City's right to regulate James Cable's rates the sole consideration for the franchise contract. (App. at 11-14). The appellate court also held that the Cable Act was not "intended to pre-empt or prohibit" an exclusive cable television franchise. (App. at 8).

The appellate court also ruled on two claims not explicitly referenced in the trial court's order. First, the appellate court considered the City's claim that since the Cable Act had removed the City's ability to regulate rates, yet (at least according to the trial court's holding) had preserved James Cable's right to operate a cable television franchise free of competition from the City or anyone else, the franchise now constituted a "monopoly" prohibited by the state constitution. The appellate court held that James Cable's freedom from competition under the franchise was not a prohibited monopoly because there had been no "common right" to use the City's streets for cable television purposes prior to the grant of the franchise. (App. at 14). The appellate court also held

that the state private act on which the City relied allowed the City to construct, operate and maintain a cable television system only *if* there were no existing exclusive franchise. (App. at 14-17).

The City then applied for review to the Supreme Court of Tennessee, which application was denied *per curiam*. (App. at 1). This petition for certiorari review then ensued.

REASONS FOR ALLOWANCE OF THE WRIT

1. THE CABLE COMMUNICATIONS POLICY ACT OF 1984 SHOULD NOT BE CONSTRUED TO ALLOW EXCLUSIVE, NON-RATE REGULATED CABLE TELEVISION FRANCHISES TO CONTINUE IN EXISTENCE AFTER THE DATE OF THE ACT'S PASSAGE, IN COMMUNITIES WHERE THE CABLE TELEVISION MARKET IS NOT A "NATURAL MONOPOLY," SINCE SUCH CONSTRUCTION PERPETUATES A REGULATORY SCHEME THAT INFRINGES THE FIRST AMENDMENT RIGHTS OF OTHER SPEAKERS WISHING TO ENTER SUCH MARKET, AND IS OTHERWISE CONTRARY TO THE EXPRESSLY STATED LEGISLATIVE PURPOSES OF THE CABLE ACT.

The City respectfully submits that the Tennessee Court of Appeals, and the Supreme Court of Tennessee in refusing to review the former court's decision, have decided an important question of federal law, which has not been, but should be, settled by this Court. Due to the proliferation of both private cable television systems and municipal cable television systems that might compete

with existing franchises, special and important reasons exist justifying this Court's granting of a Writ of Certiorari in the instant case.

As of the end of 1978, it was reported that nineteen municipally-owned cable television systems existed across the United States, Richard M. Synchef, *Municipal Ownership of Cable Television Systems*, 12 U.S.F. L. Rev. 205, 235 n. 15 (1978), and it was then hypothesized that most such municipally-owned cable television systems were (and would be) located in rural, geographically inaccessible or difficult terrain areas economically impractical for a commercial concern to "wire." *Id.* at 230. By 1989, however, there were reportedly ten communities that already had privately-owned cable television systems, but which nevertheless were considering building rival municipally-owned systems. Kagan, *Cable TV Franchising* 6 (July 31, 1989). By autumn of the following year that number had increased greater than three-fold, to thirty-six such municipalities, Kagan, *Cable TV Franchising* at Supp. 2-6 (October 31, 1990), and the number now appears to be in excess of eighty-four.

The Eleventh Circuit Court of Appeals recently reaffirmed such municipalities' right to compete with existing private cable television systems, in *Warner Communications, Inc. v. City of Niceville*, 911 F.2d 634 (11th Cir. 1990), *cert. denied*, ___ U.S. ___ (1991). And within only one year following the Cable Act's passage, scholars noted that "The Act expresses no plain intention to displace competition with regulated monopoly." Gary L. Christensen, *State & Local Regulation* (October 7, 1985), *reprinted in*, **Cable Television: Retrospective & Prospective** 129, 136 (Practicing Law Institute 1985).

The proliferation of municipalities entering into the cable television industry has been precipitated by private cable operators raising rates across the nation:

> The public's consciousness is awakening. Recent rate increases, retiering and channel realignments by cable operators have illustrated that traditional regulatory remedies have been taken away from local officials and no consumer recourse substituted.
>
> * * *
>
> The incredible escalation in cable system prices in recent years can be explained only by the expected monopoly profits. The average per subscriber cost of systems increased five-fold in the last decade.

Nicholas P. Miller, *The Cable Act Revisited: The Public Interest Versus The Cable Monopoly – A White Paper* (July 23, 1987), *reprinted in,* **Cable Television 1988: Three Years After the Cable Act 41,** 51-60 (Practicing Law Institute 1988). In addition, "The increases in cable rates since 1986 and the inability of municipalities to control such increases under the FCC's effective competition definition have caused concern in Congress." Norman M. Sinel, Patrick J. Grant, & William E. Cook, *Recent Developments in Cable Law* 122 (December 24, 1990), *reprinted in,* 1 **Cable Television 1991: Living with Reregulation** 15, 142 (Practising Law Institute 1991).

Despite the nationwide movement of municipalities into the cable television market as a result of private cable television operators (such as James Cable) exercising their right to be free from rate regulation under the Cable Act and regulations promulgated pursuant thereto,

a very basic question posed by the Cable Act remains unresolved, i.e., whether *exclusive* cable television franchises continue to be valid. James Cable claims such exclusivity provisions remain in force under the Cable Act's "grandfather" provision, 47 U.S.C. § 557.

The grandfather provision of the Cable Act, however, specifically states that the provisions of any franchise in effect on the effective date of the Cable Act "shall remain in effect, *subject to* the *express provisions* of this subchapter. . . . " 47 U.S.C. § 557(a) (emphasis supplied). Such an "express provision" of the Cable Act specifically states that any provision of an existing franchise "which is inconsistent with this chapter *shall* be deemed to be preempted and superseded." 47 U.S.C. § 556(c) (emphasis supplied).

Despite the well-established rule that the use of the word "shall" in statutes denotes a mandatory, rather than permissive, meaning, the Tennessee state appellate court, as well as the state supreme court (to the extent it refused to review the lower court's opinion) have both ignored the clear mandate of the Cable Act, since the Act's expressly stated purposes are directly contradictory to the continuance of exclusive, government-granted local monopolies in cable television.

The express provision of the Cable Act which states Congress' purpose in the passage of the legislation is 47 U.S.C. § 521. Included therein is Congress, desire that *competition* in cable communications be promoted, while minimizing "unnecessary regulation that would impose an undue economic burden on cable systems." 47 U.S.C. § 521(6).

The City respectfully submits that James Cable's construction of the Cable Act is directly negatived by the Act's express provision setting forth the purposes of the Act. Simply put, James Cable "wants its cake and to eat it, too," insisting on its right under the Cable Act to be free from "unnecessary regulation" and "undue economic burden," but at the same time denying the right of the City, or any other cable television system operator, to promote competition by entering the local cable television market.

In the proceedings below, both James Cable and the Tennessee state courts which agreed with it on the point placed much emphasis on the Cable Act's statement that franchising authorities may award "1 or more" cable television franchises for a given area comprising a franchising authority's jurisdiction. 47 U.S.C. § 541(a). The City respectfully asserts that such language is a poor foundation indeed on which to build a monopolistic scheme that, on the one hand, grants franchisees exclusive cable television rights free from competition by other cable operators, yet on the other hand also prohibits local franchisors from regulating the single most salient feature of such systems, and the area most likely to be abused in the absence of such regulation: the rates charged consumers.

The "1 or more" statutory language on which James Cable and the state courts have relied is simply too weak to sustain the state courts' errant construction of the Cable Act, under even the most basic principles of statutory construction.

"One or more" simply states the *number* of franchises which a franchising authority may grant within its jurisdiction. It says nothing regarding whether such franchises may be exclusive or nonexclusive. For example, a franchising authority clearly could grant one single *non*-exclusive cable television franchise under the literal meaning of this provision of the Cable Act.

The general rule of statutory construction requires adherence to the "letter," or literal meaning, of a statute. *Crooks v. Harrelson*, 282 U.S. 55 (1930). Conversely, this Court has long held that any construction which contradicts the letter of a statute should be carefully scrutinized and applied with caution and circumspection. *Id.; Priestman v. United States*, 4 U.S. 28, 1 L. Ed. 727 (1800). Departure from the literal meaning of statutory language occasionally may be indicated by certain relevant internal evidence within the statute itself, and where such a construction is *necessary in order to effect the legislative purpose;* but there is *no* concern for such a departure where a literal reading of the statute is *consistent* with its legislative purpose. *Malat v. Riddell*, 383 U.S. 569 (1966).

The state courts below engaged in just such a departure from the literal meaning of the Cable Act by accepting James Cable's position that "1 or more" should be read to mean "one *exclusive* franchise or more nonexclusive franchises." Such a construction is directly contradictory to the intent of Congress that the Cable Act promote competition, as specifically set forth in 47 U.S.C. § 521(6).

Furthermore, the construction placed on the Cable Act by the state courts below is also contrary to the *other* specifically stated legislative purposes of the Cable Act.

For example, one such legislative purpose of the Cable Act is to "establish franchise procedures . . . which assure that cable systems are responsive to the needs and interests of the local community." 47 U.S.C. § 521(2). Yet under the construction given the Cable Act by James Cable, the operation of its continuing exclusive franchise will remain *unresponsive* to such local needs, being regulated neither by the City's former power over rates nor by market conditions which, if competition were present, might encourage such responsiveness.

As was true in other cases, *see, e.g., Warner Cable Communications, Inc. v. City of Niceville, supra,* it was James Cable's unresponsiveness to local needs which precipitated the City's entry into the local cable television market in the first instance. This Court's consideration of the practical adverse effect of James Cable's construction of the Cable Act (i.e., allowing James Cable to remain unresponsive to local needs) is both needed and entirely proper; it is generally regarded as permissible to consider the consequences of a proposed interpretation of a statute which is fairly susceptible of two constructions due to a claimed ambiguity in its terms. *Kreitlin v. Ferger,* 238 U.S. 21 (1915).

The City, however, wishes to make clear that it does *not* concede that there is any ambiguity in the Cable Act with respect to whether the Act was intended to promote competition instead of promoting the exclusivity of cable franchises that might be created or "grandfathered" thereunder. The provisions relied upon by James Cable for its construction of the Cable Act, the "grandfather" provision found in 47 U.S.C. § 557(a), and the "1 or more" phrase in 47 U.S.C. § 541(a)(1), are both general in nature.

Neither of these provisions specifically refer to the exclusivity of cable television franchises, or, conversely, the promotion of competition in the cable television industry.

In contrast, 47 U.S.C. § 521(6) *does* specifically state that the legislative purpose of Congress in passing the Cable Act was to *promote* competition. The terms of a more specific statute take precedence over those of a more general statute where both speak to the same concern. *Busic v. United States*, 446 U.S. 398 (1980) (regardless of the statutes' temporal sequence). Thus, Section 521(6) takes precedence over Sections 557(a) and 541(a)(1), and the construction placed upon the Cable Act by James Cable and the state courts below is shown to be erroneous.

Finally, the City notes that the pronouncements of this Court and lesser federal courts concerning First Amendment rights of cable television system operators, or those who wish to operate cable television systems in competition with established operators who have been granted exclusive franchises, cast doubt upon the constitutionality of James Cable's construction of the Cable Act (as legitimizing or "grandfathering" previously existing exclusive cable television franchises). This Court has often enunciated the fundamental rule that there is a presumption in favor of the constitutionality of a legislative enactment. *E.g., Davies Warehouse Co. v. Bowles*, 321 U.S. 144 (1944); *United States v. Carolene Products Co.*, 304 U.S. 144 (1938); *Becker Steel Co. v. Cummings*, 296 U.S. 74 (1935); *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935).

This Court has made it clear that cable television operators have certain First Amendment rights, *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), although the full and final parameters of such rights have yet to be established. However, these rights do not necessarily protect private cable operators such as James Cabie from competition from a municipally-owned system, even if the municipally-owned cable television system might enjoy some advantages which the private franchisee believes will surely result in making its continued operation economically infeasible. *Warner Cable Communications, Inc. v. City of Niceville, supra.*

In the wake of *Preferred Communications, supra,* several lower courts have invalidated exclusive cable television franchises, as contrary to the free exchange of ideas protected by the First Amendment, upon a finding that the local cable television market, in the absence of the exclusive franchise, would not naturally produce a monopoly. *See, e.g., Pacific West Cable Co. v. City of Sacramento,* 672 F. Supp. 1322 (E.D. Cal. 1987); *Century Fed., Inc. v. City of Palo Alto,* 648 F. Supp. 1465 (N.D. Cal. 1986), *appeal dismissed,* ___ U.S. ___, 108 S. Ct. 1002 (1988); *Group W Cable, Inc. v. City of Santa Cruz,* 669 F. Supp. 954 (N.D. Cal. 1987); *see also, International Broadcasting Corp. v. City of Bismarck,* 697 F. Supp. 1094 (D.N.D. 1987).

Conversely, if a "natural monopoly" is shown to exist, exclusive franchises can withstand First Amendment scrutiny. *See, e.g., Central Telecommunications, Inc. v. TCI Cablevision, Inc.,* 800 F.2d 711 (8th Cir. 1986), *cert. denied,* 480 U.S. 910 (1987); *Community Communications Co., Inc. v. City of Boulder,* 660 F.2d 1370 (10th Cir. 1981),

cert. dismissed, 456 U.S. 1001 (1982); *Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982).

The City respectfully asserts that under James Cable's construction of the Cable Act, this important First Amendment dichotomy is necessarily erased. According to the state courts' holdings below, exclusivity provisions of cable television franchises are "grandfathered" under the Cable Act, and valid simply because the Act states that franchising authorities may grant "1 or more" cable television franchises, even though such provision [47 U.S.C. § 541(a)(1)] mentions only the number of franchises that may be awarded, and says nothing of whether the one franchise that may be awarded may be exclusive or nonexclusive. Such an unconstitutional result must be avoided, such that this Court should grant the writ prayed for in this petition. Even if this Court should instead decide that the "natural monopoly" dichotomy referenced above should be discarded in favor of some other rule, the importance of such a clarification in the important First Amendment arena, particularly in light of the overall proliferation of cable television systems and the ever growing number of municipalities considering or already undertaking cable television system ownership and operation, provides an equally compelling circumstance supporting the grant of the writ in the instant case.

Another factor making these First Amendment issues particularly relevant to the City's Cable Act claim is that the purposes behind according such First Amendment protections to "cablespeech" are the same as those specifically enumerated in the Cable Act itself. The Cable Act specifically states that one of its legislative purposes is to assure that cable communications provide, and are

encouraged to provide, "the widest possible diversity of information sources and services to the public." 47 U.S.C. § 521(4). This legislative purpose of the Cable Act coincides with the line of cases beginning with the seminal decision of *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969), and concluding with the Court's recent decision in *Leathers v. Medlock*, ___ U.S. ___, 59 U.S.L.W. 4281 (1991).

In *Red Lion Broadcasting v. FCC, supra*, the Court repeatedly stressed that in the application of First Amendment rights in the broadcasting field, it is the right of the public at large to effectively receive a maximum diversity of programming, a right which is "paramount" and "crucial." 395 U.S. at 389-91. The Court emphasized, as well, that there is no First Amendment right on the part of a broadcaster to monopolize a particular reception market. This same approach was reiterated in *CBS v. Democratic National Committee*, 412 U.S. 94, 102 (1973), and *Leathers v. Medlock, supra* 59 U.S.L.W. at 4284, *quoting*, *Cohen v. California*, 403 U.S. 15, 24 (1971). Focusing upon the intent of Congress in enacting statutory regulation of the broadcast industry, this Court has frequently been called upon to review "the long-established regulatory goals of maximization of outlets for local expression and diversification of programming," *FCC v. Midwest Video Corp.*, 440 U.S. 689, 699 (1979), and "the federal objective of ensuring widespread availability of diverse cable services throughout the United States." *Capitol Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 717 (1984). Although the First Amendment value of citizens' access to diversity was not explicitly articulated in the Court's decision in *City of Los Angeles v. Preferred Communications, Inc., supra*, it was clearly embraced within the Court's recognition of the

First Amendment rights of the petitioning cable operator who was seeking to provide a second cable market to a portion of the City of Los Angeles.

The various courts of appeals which have had occasion to review broadcast and cable competition have, drawing upon *Red Lion* and its progeny, refused to apply First Amendment principles in such a manner as to preclude listeners from receiving a diversity of programming. *Community Communications Co. v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982); *Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330 (D.C. Cir. 1985). Because the Cable Act specifically embodies the same goal protected by the First Amendment, *see*, 47 U.S.C. § 521(4), the construction placed on the Cable Act by James Cable and the courts below, precluding listeners within Jamestown's jurisdiction from receiving a diversity of programming, is clearly incorrect.

In conclusion, the City respectfully submits that the construction of the Cable Act by the Tennessee courts below results in the unjust circumstance that cable television franchisors across the United States can no longer regulate cable operators, rates, but at the same time those cable operators can retain previously established monopolies in the local cable "marketplace of ideas." A statutory construction resulting in injustice must be avoided. *See, e.g., In re Chapman*, 166 U.S. 661 (1897); *American Dredging Co. v. Local 25, Marine Div., Int'l Union of Operating Eng'rs, AFL-CIO*, 338 F.2d 837 (3d Cir. 1964), *cert. denied*, 380 U.S. 935 (1965). With the nation on the brink of a new century of cable communications, this Court should take the opportunity to "clear the air" regarding the construction

placed upon the Cable Act by the courts below, and grant the petition for writ of certiorari.

CONCLUSION

For all the above reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 21, 1991

APPENDIX

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IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

JAMES CABLE PARTNERS, L.P., a Delaware Limited Partnership d/b/a BIG SOUTH FORK CABLEVISION,	)	
Plaintiff-Appellee,	)	FENTRESS
V.	)	CHANCERY
THE CITY OF JAMESTOWN, being represented by its mayor, STONEY C. DUNCAN, and its Aldermen, BOB BOW, HAROLD WHITED, CORDIS TAUBERT, MARK CHOATE and CAIN CHOATE,	)	01-A-01-9008-CH-00296
Defendant-Appellant.	)	(Filed Jun. 24, 1991)

ORDER

Upon consideration of the application for permission to appeal and the entire record in this cause, the Court is of the opinion that the application should be denied.

PER CURIAM

IN THE COURT OF APPEALS OF TENNESSEE,
WESTERN SECTION AT NASHVILLE

JAMES CABLE PARTNERS, L.P., a Delaware limited partnership doing business as BIG SOUTH FORK CABLEVISION, Plaintiff/Appellee, VS. THE CITY OF JAMESTOWN, TENNESSEE, being represented by its Mayor, STONEY C. DUNCAN, and its Aldermen, BOB BOW, HAROLD WHITED, CORDIS TAUBERT, MARK CHOATE and CAIN CHOATE, Defendant/Appellant.	No. 01-A-01-9008-CH-00296 FENTRESS CHANCERY (Filed Mar. 22, 1991)

From the Chancery Court of
Fentress County at Jamestown
Honorable Billy Joe White, Chancellor

Ernest A. Petroff, Hunstville
T. Leslie Dooley, Huntsville
BAKER, WORTHINGTON, CROSSLEY,
STANSBERRY & WOOLF

and

Burt A. Braverman, Washington, D.C.
COLE, RAYWID & BRAVERMAN

Attorneys for the Plaintiff/Appellant James Cable Partners, et al.

R. Bruce Ray, James Town
Attorney for the Defendant/Appellant City of Jamestown, Tennessee

OPINION FILED:

REVERSED AND DISMISSED

FARMER, J.

TOMLIN, P.J., W.S. : (Concurs)

CRAWFORD, J. : (Concurs)

On March 14, 1977, the defendant, City of Jamestown, Tennessee, (hereinafter "City") adopted an ordinance which granted Clarence Harding, plaintiff's predecessor in interest:

> the exclusive right to erect, maintain, operate and utilize facilities for the operation of communications systems and additions thereto in the streets of the City for a period of 25 years, in accordance with the applicable laws and regulations of the United States of America and the state of Tennessee, and the Charter, regulatory ordinance and regulations of the City.

The exclusive franchise was subsequently assigned to Mountain Cablevision, thereafter to Paradigm Communications, Inc., and ultimately to James Cable Partners, L.P., plaintiff.

On January 8, 1990, the City granted itself a franchise to operate a competing cable television system in Jamestown. The plaintiff filed a declaratory judgment action seeking a declaration of the rights, status, and relation of the parties hereto in regard to the exclusive franchise agreement. The City in their answer contended that the

franchise was no longer "exclusive" because the exclusivity provision had been preempted by the Cable Communications Policy Act of 1984[1], codified at 47 U.S.C. § 521, *et seq.* The City also argued that the exclusivity provision had been rescinded under the general contract principle of "failure of consideration." The City had reserved the right to regulate rates in this franchise agreement and it is uncontroverted that the Act now disallows and preempts the City's right of rate regulation in this case.[2] The City contends that this preempted right of

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[1] Specifically, the City contended that Sections 621 and 636 of the "Act" preempted exclusive franchises. Section 621(a)(1) provides: "A franchising authority may award . . . 1 or more franchises within its jurisdiction." Cable Communications Policy Act § 621(a)(1), 47 U.S.C. § 541 (1984). Section 636 provides in pertinent part that "any provision of law of any State, political subdivision, or agency thereof, or franchising authority, *or any provision of any* franchise granted by such authority, which is inconsistent with this Act *shall be deemed to be preempted and superseded.*" (Emphasis added) *Id.* at 47 U.S.C. § 556.

[2] The Act specifically provides that "[a]ny Federal agency or State may not regulate the rates for the provision of cable service except to the extent provided under this section. Any franchising authority may regulate the rates for the provision of cable service, or any other communications service provided over a cable system to cable subscribers, but only to the extent provided under this section. . . . Within 180 days after the date of the enactment of this title, the [Federal Communications] Commission shall prescribe and make effective regulations which authorize a franchising authority to regulate rates for the provision of basic cable service in circumstances in which a cable system is not subject to effective competition." Cable Act §§ 623(a) and 623(b)(1), 47 U.S.C. at § 543. The F.C.C. (the "Commission") has determined that "effective competition" exists in a community where three television broadcasts are

(Continued on following page)

regulation was the core consideration for this contract;[3] therefore, the exclusive provision fails.

The trial court held that the Act did not preempt or prohibit the grant of an exclusive franchise. In regard to the City's inability to regulate rates under the Act, the trial court found that this was the sole consideration for the exclusive grant of the franchise agreement. Accordingly, the court concluded that the exclusivity provision must fail or be rescinded due to this lack of consideration.

The issues on appeal as set forth in pertinent part by the parties are:

> I. Whether the Chancellor erred in determining the Cable Communications Act did not preempt exclusive franchises and whether it was error to admit into evidence expert testimony by the draftsman of the Cable Communications Act, David Klaus, as to its meaning.
>
> II. Whether the Chancellor erred in determining that a failure of consideration had

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(Continued from previous page)

viewable through off-air reception. *See* FCC Cable Television Service, 47 C.F.R. § 76.5 (1990). Pursuant to this definition, James Cable is subject to effective competition.

[3] Once an ordinance which grants a franchise is accepted and "all conditions imposed instant to the right performed, it ceases to be a mere license and becomes a valid contract, and constitutes a vested right." 12 McQuillin, Municipal Corporations § 34.06 (1986). This contract once established has the same status and effect as any other contract enforceable under the law. 36 Am. Jur. 2d *Franchises* § 6 (1968).

occurred with regard to the exclusivity provision of the franchise and that, therefore, such provision should be rescinded.

I.

PREEMPTION.

As we have noted, the City contends that the Cable Communications Act of 1984 preempts the grant of exclusive franchises. The "Act" provides in pertinent part that: "A franchising authority may award . . . 1 or more franchises within its jurisdiction." Cable Act § 621(a)(1), 47 U.S.C. at § 541. In addition, the Act provides that any provision of a franchise "which is inconsistent with this Act shall be deemed to be preempted and superseded." *Id.* at 636, 47 U.S.C. at § 556. It is the City's position that since the Act specifically authorizes multiple franchises, then the exclusivity provision is "preempted and superseded." The plaintiff argues, on the other hand, that it was the legislative intent, by expressly providing for "1" or more franchises, to specifically authorize exclusive franchises.

The basic rule of statutory construction is to ascertain the legislative purpose and intent as expressed in statute to be construed. The legislative intent is to be derived primarily from the natural and ordinary meaning of the language contained therein when read in context with the whole statute. The language shall not be given any forced construction that extends or places limitations upon the import of that language. *Metropolitan Government of Nashville and Davidson County v. Motel Systems, Inc.*, 525

S.W.2d 840 (Tenn. 1975); *Worrall v. Kroger Co.*, 545 S.W.2d 736 (Tenn. 1977).

In order to establish the legislative intent the plaintiff introduced the testimony of David Klaus, formal counsel for the Energy and Commerce Committee of the House of Representatives. Mr. Klaus was responsible for overseeing the drafting of the Act. He testified regarding his understanding of the congressional intent and the purpose of the Act. The City objected to the testimony of Mr. Klaus at the time it was offered contending that it was inadmissible opinion testimony.[4] We must agree.

It is well-settled principle in this state that while documents and reports evidencing legislative intent and purpose have been freely admitted into evidence when construing statutes, we cannot resort "to the opinions of legislators or others concerned in the enactment of the law, for the purpose of ascertaining the intent of the legislature" even when there is ambiguous language used therein. *Levy v. State Bd. of Examiners, etc.*, 553 S.W.2d 909, 913 (Tenn. 1977), *quoting Bowaters Carolina Corp. v. Smith*, 257 S.C. 563, 186 S.E.2d 761, 764 (1972). Furthermore, when a statute is unambiguous legislative intent can be ascertained from the face of the statute. *Neff v. Cherokee Ins. Co.*, 704 S.W.2d 1 (Tenn. 1986); *Anderson v. Outland*, 210 Tenn. 526, 360 S.W.2d 44 (1962).

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[4] Mr. Klaus specifically testified that the purpose of § 621 [47 U.S.C. 541] of the Act was to allow a franchising authority to employ whatever franchising power it had to grant 1, 2, 3 or more franchises. He stated that the Act was not intended to revise that authority, nor was it intended to interfere with the number of franchises awarded.

The stated purpose of the Act is:

PURPOSES

Sec. 601. [47 U.S.C 521] The purposes of this title are to –

(1) establish a national policy concerning cable communications;

(2) establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community;

(3) establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems;

(4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public;

(5) establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards established by this title; and

(6) promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.

Cable Act § 601, 47 U.S.C. at § 521. The City contends that since the Act specifically provides that one of the stated purposes is to "promote competition in cable communications and minimize unnecessary regulation," then it is

clear that an exclusive franchise would be inconsistent with the Act.

We do not agree with the City's contention. In ascertaining the legislative intent the meaning should be derived not from single or special words in a sentence or section but from the statute taken as a whole. *Hall v. State*, 124 Tenn. 235, 137 S.W. 500 (1911); *State ex rel. Thomason v. Temple*, 142 Tenn. 466, 220 S.W. 1084 (1920). Although one of the primary purposes of the Act was to promote competition, it was clearly in the contemplation of the legislature that this would not always be the case. The Act provides or allows for rate regulation in areas or communities where there is no effective competition.[5] *See* Cable Act § 623, 47 U.S.C. at § 543. In addition, the Act specifically authorizes one *or* more franchises. It is hard for us to conceptualize the grant of an exclusive franchise being *inconsistent* with the import of this language. The Act also contains a provision that clearly enumerates the legislative intention to give existing franchises their full force and effect. Section 637 of the Act provides specifically that

> (a) The provisions of–
>
> (1) any franchise in effect on the effective date of this title, including any such provisions which relate to the designation, use, or support for the use of channel capacity for public, educational, or governmental use, and

---

[5] See footnote 2. As we have indicated James Cable is subject to effective competition pursuant to the F.C.C. definition.

> (2) any law of any State (as defined in section 3(v) in effect on the date of the enactment of this section, or any regulation promulgated pursuant to such law, which relates to such designation, use or support of such channel capacity.
>
> shall remain in effect, subject to the express provisions of this title, and for not longer than the then current remaining term of the franchise as such franchise existed on such effective date.
>
> (b) For purposes of subsection (a) and other provisions of this title, a franchise shall be considered in effect on the effective date of this title if such franchise was granted on or before such effective date.

Id. at § 637, 47 U.S.C. at § 557.

While we are not holding that this Act legitimizes[6] an exclusive franchise, we do not feel it was intended to preempt or prohibit such a grant. We feel this is an interpretation which is clearly and unambiguously derived from the language of the statute itself and in conformity therewith. For us to hold otherwise would be to extend or contradict the import of the language contained in this act.

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[6] Although the language of the Act is not inconsistent with an exclusive franchise, we do not feel this Act was intended to override state authority or state law which bars exclusive franchises. *See* Brenner & Price, Cable Television and Other Non-broadcast Video Law and Policy § 3.02(5) (1986).

II.

FAILURE OF CONSIDERATION.

A. Partial Rescission.

As we have noted, the plaintiff's predecessor in interest, Clarence Harding, was granted:

> the *exclusive* right to erect, maintain, operate and utilize facilities for the operation of communications systems and additions thereto in the streets of the City for a period of 25 years, in accordance with the applicable laws and regulations of the United States of America and the State of Tennessee, and the Charter, regulatory ordinances and regulations of the City. (Emphasis added)

In return for this exclusive grant the cable company agreed, among other things, that:

> *SECTION 10.* The charges by the Company shall be fair and reasonable, and exclusive of any tax or taxes which may be assessable against the scheduled installations or services, shall initially be as follows:
>
> Charge for the standard initial attachment shall be a maximum of $30.00 for the first outlet, and $5.00 maximum for each additional connection, not exceeding three such additional connections. Charge for monthly transmission service shall be not more than $10.00 per month for the first television receiving set and $1.00 per month for each additional television receiving set, not exceeding three such additional television receiving sets. Provided that in installations requiring extension of cable or

> facilities in excess of the ordinary and customary requirements, or requiring additional connections in excess of three such additional connections, charges shall be negotiated between the Company and the subscriber.
>
> No changes in the rates or charges shall be made by Company without the approval of City. The City shall be notified at least thirty (30) days prior to any proposed change of rates or charges. An explanation for the reason for making said change shall accompany [sic] such notice or shall be made to the Mayor and Board of Aldermen at the time of notification. The Company shall have the right to make rules and regulations governing its services, not inconsistent with the terms hereof or applicable regulations.

This exclusive franchise was ultimately assigned to the plaintiff which is indicated by an agreement between the plaintiff and defendant. The parties' agreement provides in pertinent part that:

> [T]he Franchise was duly issued and is currently in full force and effect according to its terms. There exists no default or violation of the Franchise and no event has occurred that . . . would lead to default. . . .
>
> 4. As between the parties, all other provisions, terms and conditions set forth in the Franchise shall and do remain valid and in full force and effect.
>
> 5. As a consideration for the approval by the city given to James, James agrees upon the transfer of the Franchise the Franchise Fee shall be increased to five percent (5%) of the gross

> revenues per year from all cable services, and James agrees the Franchise Ordinance be amended to provide such Franchise fee.

This agreement was approved by the City on June 13, 1988, well after the enactment of the 1984 Act.

It is uncontroverted in this case that § 623 of the Act took away the City's right to regulate the rates of the plaintiff's cable communication system. Section 623 provided that a franchise authority could only regulate rates if the cable system in that community was not subject to "effective competition." *See* Cable Act § 623, 47 U.S.C. at § 543. The Act gave the Federal Communications Commission (hereinafter "FCC") the authority to define or determine what constitutes "effective competition." Pursuant to the FCC definition, the plaintiff is subject to effective competition; therefore, the right to regulate rates as provided for in the parties' contract is preempted by the Act.[7] The trial court held and the City contends that the ability to regulate rates was the sole consideration for the exclusive grant and, therefore, this provision should be rescinded.

The remedy of rescission is a discretionary matter which should be exercised sparingly and only when the situation demands such. *Early v. Street*, 192 Tenn. 463, 241 S.W.2d 531 (1951); *Robinson v. Brooks*, 577 S.W.2d 207 (Tenn. Ct. App. 1978); *Frierson v. International Agricultural Corp.*, 24 Tenn. App. 616, 148 S.W.2d 27 (1940). Whether

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[7] The Act specifically provides that "any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superseded." Cable Act § 636(c), 47 U.S.C. at § 556(c).

there has been a failure of consideration is a factual question. 17A C.J.S. *Contracts* § 613 (1963), and we must, therefore, uphold the trial court's explicit finding that there was a failure of consideration unless the evidence in this case preponderates otherwise. *See* T.R.A.P. 13(d).

The Chancellor in the is case only "partially" rescinded the parties' contract. The court specifically found that "the right of the city of Jamestown to regulate rates was the whole consideration for the exclusive provision of the franchise, and therefore, the preemption of the right to regulate rates rescinded the exclusive provision of the franchise. . . . " As a general rule, a contract can only be rescinded *in toto*. A contract can only be partially rescinded where the contract is severable. A contract is severable where each part is so independent of each other as to form a separate contract. The basic premise behind disallowing a party to affirm in part and repudiate in part is that one should not be able to "accept the benefits on the one hand while he shirks its disadvantages on the other." 17A C.J.S. *Contracts* § 416 (1963); *See Baird v. McDaniel Printing Co., Inc.*, 25 Tenn. App. 144, 153 S.W.2d 135 (1941).

Basically a contract is not severable or devisable when its purpose, terms and nature contemplate that its parts and consideration shall be interdependent and common to each other. 17A C.J.S. *Contracts* § 331 (1963). There is no precise definition of when a contract is "entire" or when it is "severable" and each case must ultimately depend on its own facts; however, a whole or entire contract has been referred to as a contract in which the "promises of both parties are interdependent and relate to the same subject matter," *Williams Hardware Co. v.*

Phillips, 109 W.Va. 109, 153 S.E. 147 (1930), or "is one which may not be divided into independent parts." *LeMire v. Haley*, 91 N.H. 357, 19 A.2d 436, 439 (1941). A devisable contract, on the other hand, has been referred to as one in which the performance is "divided into different groups, each set embracing performances which are the agreed exchange for each other," *Pittsburgh Plate Glass Co. v. Jarrett*, 42 F.Supp. 723, 730 (M.D. Ga. 1942), modified on other grounds, *Jarrett v. Pittsburgh Plate Glass Co.*, 131 F.2d 674 (5th Cir. Ga. 1942), or a contract in which the "performance is divided into two or more parts with a definite apportionment of the total consideration to each part." *Integrity Flooring v. Zandon Corp.*, 130 N.J.L. 244, 32 A.2d 507, 509 (N.J. 1943).

In the present case the plaintiff was granted an exclusive franchise in return for which they agreed to numerous conditions. This contract was not one susceptible to division whereby it could be divided into two or more parts. Each part, condition and consideration was in contemplation and accomplishment of the whole, that being to provide a cable service to the Jamestown community. Since each provision was part and parcel of the whole, this cannot be referred to as a devisable contract. Therefore, no one provision can be rescinded without the whole.

The question now becomes whether the City's right to regulate rates is such an integral part of the parties' agreement that the entire contract should be rescinded. The contract may be rescinded if the failure of consideration was such an essential part of the contract that it defeats the very object of the contract or concerns a matter of such grave importance that the contract would

not have been executed had that default been contemplated. *Farrell v. Third National Bank in Nashville*, 20 Tenn. App. 540, 101 S.W.2d 158 (1936); *Lloyd v. Turner*, 602 S.W.2d 503 (Tenn. Ct. App. 1980).

The City in the instant case granted the plaintiff the exclusive right to operate a cable communication system. The consideration for this grant were the conditions upon which the franchise was granted and the benefit the public proposed to derive from the operation of this franchise. 37 C.J.S. *Franchises* § 16 (1975). As conditions of this grant the plaintiff agreed; (1) to charge the regulated rates set by the City; (2) to acquire, maintain, and erect such poles, towers and facilities as are required for the operation of such; (3) to indemnify and hold harmless the City from any claim for injury or damage to property; (4) carry insurance to protect parties against any liabilities that arise; (5) post bond in the amount of $10,000; (6) maintain the company such that it would not interfere with the off-the-air television signals; (7) relocate poles at its own expense if necessitated by the change of any street grade, allotment or width; (8) commence installation of the system within (1) year; and (9) maintain a local office. The agreement also reserved to the City the right to revoke this franchise if the company failed to comply with the provisions contained therein. In addition, the agreement also contained a severability clause. Further, the agreement wherein City approved the assignment to plaintiff increased the franchise fee to five percent (5%) of gross revenues per year.

This is not a case where we have total failure of consideration. This is a case where one part of the consideration has been preempted by the Cable Communications Act. However, partial failure of consideration is not

grounds for rescission unless the failure defeats the very object or purpose of the contract or renders that object impossible to accomplish. *Farrell,* 101 S.W.2d 158 (Tenn. Ct. App. 1936). The preemption of this provision did not destroy the principal object of this contract. The plaintiff was required to comply with several conditions as consideration for this grant and the public still derives a benefit from its operation. There is no indication that the City's ability to regulate rates was of such grave importance that the franchise would not have been contemplated without the inclusion of such.

B. Monopoly.

The City also contends that without the ability to regulate rates that this "exclusive" grant is essentially a monopoly and in violation of Article I, Section 22 of the Tennessee Constitution which provides: "[M]onopolies are contrary to the genius of a free State, and shall not be allowed." The Tennessee Supreme Court stated in *City of Watauga v. City of Johnson City,* 589 S.W.2d 901 (Tenn. 1979), that a monopoly, as enumerated in the State Constitution, is "an exclusive right granted to a few, which was previously a common right. If there is no common right in existence prior to the granting of the privilege for franchise, the grant is not a monopoly." *Id.* at 904, *citing Proprietors of Charles River Bridge v. Proprietors of Warren Bridge,* 36 U.S. 420, 9 L.Ed. 773 (1837); *Leeper v. State,* 103 Tenn. 500, 53 S.W. 962 (1899). The City of Jamestown essentially granted the plaintiff the exclusive right to use its streets in the operation of its communications system for a period of 25 years. It certainly was not a common right to use the streets of the city of Jamestown prior to

this grant; therefore, this grant cannot be classified as a monopoly. *See* 12 McQuillin, Municipal Corporations §§ 34.03 – 34.06 (1986). This opinion is not intended to stand for the proposition that T.C.A. § 7-59-102(a) authorizes the grant of an exclusive franchise because this issue was not raised by the parties, and therefore not addressed by the Court.

C. Impairment of Contract Obligations

The City lastly contends that they are entitled to operate and establish a cable communications pursuant to a private act of the State Legislature, "Private Chapter No. 138" of the Private Acts of 1990. This private act specifically provides:

> BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:
>
> SECTION 1. Article VII of Chapter 54 of the Private Acts of 1959, as amended by Chapter 222 of the Private Acts of 1965, and all other acts amendatory thereto, is amended by adding the following new Section:
>
> Section ___.
>
> (A) The board of mayor and aldermen of the City of Jamestown are authorized to establish and operate a cable television service within the confines of the City of Jamestown, Tennessee, and Fentress County, Tennessee, and to do and perform every act necessary and incidental thereto.
>
> (B) The board of mayor and aldermen of such City of Jamestown are empowered to take and appropriate such lands and

grounds, either within or without the limits of the City of Jamestown, as they may deem advisable, for the location and operation of such cable television service.

(C) The entire work, supervision, and control of the purchase, construction, operation, and maintenance of such cable television service shall be vested in the board of mayor and aldermen of the City of Jamestown. It shall be lawful for such board of mayor and aldermen to employ such subordinate officers, employees, agents, etc., as may be necessary to transact the business and do the work of constructing and operating such cable television service, and to delegate to such subordinate officers, employees, agents, etc., such authority and power as may be consistent with good business management. Such subordinate officers, employees, agents, etc., shall not have the right or authority to make any contracts binding upon such City of Jamestown unless they are expressly authorized to do so by ordinance duly passed by the board of mayor and aldermen of the City of Jamestown. The compensation to be paid to all such subordinate officers, employees, agents, etc., shall be fixed by ordinance which authorizes their appointment, and all such salaries or expenses shall be paid out of the funds or revenues herein provided for.

(D) The board of mayor and aldermen of the City of Jamestown shall have full power and authority by ordinance to make

and enforce all reasonable rules and regulations from time to time for the control and management of such cable television service, and to set rates for the use of the cable television service. The city shall have the right to enter upon the premises where cable television service is used or desired for the purpose of inspecting, repairing, installing, regulating, or terminating the use of such cable television service or otherwise arising out of the operation of such system.

(E) The board of mayor and aldermen of the City of Jamestown shall have full power and authority to borrow money to purchase, acquire, construct, extend, improve, repair or equip any such system and issue its bonds or notes therefor, including refunding bonds, in such form and upon such terms as it may determine. Any such bonds or notes shall be issued pursuant to the procedures set forth in and shall be governed by the provisions of Tennessee Code Annotated, Title 9, Chapter 21, including provisions dealing with covenants permitted in bond resolutions, security and remedies of bondholders and the system hereinabove described shall be deemed to be a "public works projeci", as that term is defined in Title 9, Chapter 21, Tennessee Code Annotated.

SECTION 2. This act shall have no effect unless it is approved by a two-thirds (2/3) vote of the legislative body of the City of Jamestown. Its approval or nonapproval shall be proclaimed by the presiding officer of the city legislative

body and certified by him to the Secretary of State.

SECTION 3. For the purpose of approving or rejecting the provisions of this act, it shall be effective upon becoming a law, the public welfare requiring it. For all other purposes, it shall become effective upon being approved as provided in Section 2.

The plaintiff contends that if this Act were construed to relieve the defendant of its obligation under the parties' contract, then it would be in violation of Article I, Section 20 of the Tennessee Constitution which provides that "no . . . law impairing the obligations of contracts, shall be made."

While we are aware that a state cannot impair the obligations of a contract unless it is in the bona fide exercise of police power, *Sherwin-Williams Co. v. Morris*, 25 Tenn. App. 272, 156 S.W.2d 350 (1941), we feel, however, that this issue does not need to be resolved. The Private Act by its own terms was not intended to impair or interfere with the City's obligations under the franchise agreement. The Private Act merely granted the City the authority to operate its own cable communications system. There is no indication that this "authority" was intended to override or preempt any existing obligation the City may have incurred. It merely granted or amended the City's charter to allow the City to operate such provided, however, they are not bound by other contractual obligations.

For all the foregoing reasons the judgment of the trial court is reversed and this cause is thereby dismissed. The

costs of this appeal are taxed to the appellee for which execution may issue if necessary.

/s/ Farmer
FARMER, J.

/s/ Tomlin
TOMLIN, P.J., W.S. (Concurs)

/s/ Crawford
CRAWFORD, J. (Concurs)

IN THE CHANCERY COURT FOR
FENTRESS COUNTY, TENNESSEE AT JAMESTOWN

JAMES CABLE PARTNERS, L.P., a Delaware limited partnership doing business as BIG SOUTH FORK CABLEVISION, Plaintiff, VS. THE CITY OF JAMESTOWN, TENNESSEE being represented by its Mayor, STONEY C. DUNCAN, and its Aldermen, BOB BOW, HAROLD WHITED, CORDIS TAUBERT, MARK CHOATE and CAIN CHOATE, Defendant.	NO. 90-3 (Filed May 25, 1990)

ORDER

This cause came to be heard before the Honorable Billy Joe White, Chancellor, at the Courthouse in Jamestown the 16th day of May, 1990, on the complaint of the Plaintiff, the answer of the Defendant, the record, the proof both oral and documentary, and the arguments of counsel, from all of which it appears to the Court this suit seeks a declaratory judgment that a cable television franchise agreement from the Defendant City of Jamestown granted in 1977, which was subsequently assigned to the Plaintiff, is exclusive and that a subsequent grant by the City to itself of a franchise to build its own proprietary cable television system is a breach of the exclusive provision of the Plaintiff's franchise.

The Defendant City of Jamestown denied any breach of contract contending the exclusive provision of the 1977 franchise was either preempted by the Federal Cable Communications Policy Act of 1984, codified in 47 U.S.C. § 521, et seq., or, that the exclusive provision of the franchise was rescinded as a result of the Cable Communications Policy Act which effectively took away the right of the City to regulate rates charged by the franchise owner to the cable customers.

On due consideration of the Cable Communications Policy Act, it is the opinion of the Court such Act does not amend the original Jamestown franchise because 47 U.S.C. § 557 grandfathers in franchises on the date of the Act subject to certain limitations, however, the Court finds the effect of the Cable Communications Act was to preempt the right of the City of Jamestown to regulate rates, at least at this time and place. The Court finds the right of the City of Jamestown to regulate rates was the whole consideration for the exclusive provision of the franchise, and therefore, the preemption of the right to regulate rates rescinded the exclusive provision of the franchise, accordingly,

It is hereby ORDERED, ADJUDGED, and DECREED the Complaint of the Plaintiff is not sustained. It is therefore, dismissed at the costs of the Plaintiff.

ENTER this 24 day of May, 1990.

/s/ B J White
BILLY JOE WHITE, CHANCELLOR

APPROVED FOR ENTRY:

/s/ Ernest A. Petroff
Ernest A. Petroff
BAKER, WORTHINGTON, CROSSLEY,
STANSBERRY & WOOLF
Attorney for the Plaintiff

/s/ R. Bruce Ray
R. Bruce Ray
Attorney for the Defendant

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Article VII of Chapter 54 of the Private Acts of 1959, as amended by Chapter 222 of the Private Acts of 1965, and all other acts amendatory thereto, is amended by adding the following new Section:

Section ___.

(A) The board of mayor and aldermen of the City of Jamestown are authorized to establish and operate a cable television service within the confines of the City of Jamestown, Tennessee, and Fentress County, Tennessee, and to do and perform every act necessary and incidental thereto.

(B) The board of mayor and aldermen of such City of Jamestown are empowered to take and appropriate such lands and grounds, either within or without the limits of the City of Jamestown, as they may deem advisable, for the location and operation of such cable television service.

(C) The entire work, supervision, and control of the purchase, construction, operation, and maintenance of such cable television service shall be vested in the board of mayor and aldermen of the City of Jamestown. It shall be lawful for such board of mayor and aldermen to employ such subordinate officers, employees, agents, etc., as may be necessary to transact the business and do the work of constructing and operating such cable television service, and to delegate to such subordinate officers, employees, agents, etc., such authority and power as may be consistent with good business

management. Such subordinate officers, employees, agents, etc., shall not have the right or authority to make any contracts binding upon such City of Jamestown unless they are expressly authorized to do so by ordinance duly passed by the board of mayor and aldermen of the City of Jamestown. The compensation to be paid to all such subordinate officers, employees, agents, etc., shall be fixed by ordinance which authorizes their appointment, and all such salaries or expenses shall be paid out of the funds or revenues herein provided for.

(D) The board of mayor and aldermen of the City of Jamestown shall have full power and authority by ordinance to make and enforce all reasonable rules and regulations from time to time for the control and management of such cable television service, and to set rates for the use of the cable television service. The city shall have the right to enter upon the premises where cable television service is used or desired for the purpose of inspecting, repairing, installing, regulating, or terminating the use of such cable television service. The city shall have the right to terminate such service on the account of the nonpayment of rates. The city shall have the full power and authority to collect and enforce collections of all monies due for the use of such cable television service or otherwise arising out of the operation of such system.

(E) The board of mayor and aldermen of the City of Jamestown shall have full power and authority to borrow money to purchase, acquire, construct, extend, improve, repair or equip any such system and issue its bonds or notes therefor, including refunding bonds, in such form

and upon such terms as it may determine. Any such bonds or notes shall be issued pursuant to the procedures set forth in and shall be governed by the provisions of Tennessee Code Annotated, Title 9, Chapter 21, including provisions dealing with covenants permitted in bond resolutions, security and remedies of bondholders and the system hereinabove described shall be deemed to be a "public works project", as that term is defined in Title 9, Chapter 21, Tennessee Code Annotated.

SECTION 2. This act shall have no effect unless it is approved by a two-thirds (2/3) vote of the legislative body of the City of Jamestown. Its approval or nonapproval shall be proclaimed by the presiding officer of the city legislative body and certified by him to the Secretary of State.

SECTION 3. For the purpose of approving or rejecting the provisions of this act, it shall be effective upon becoming a law, the public welfare requiring it. For all other purposes, it shall become effective upon being approved as provided in Section 2.